

Tuesday, May 12.

SECOND DIVISION.

[Sheriff-Substitute of
 Fife and Kinross.

SUTHERLAND v. HUTTON.

Contract—Grazing Horse for Hire—Accident to Horse while in Grazier's Custody from Cause Unexplained—Responsibility for Loss—Onus—Where Action Based on Fault.

A horse while being grazed for hire by a farmer, received an injury in consequence of which it lost the sight of one eye. In an action by the owner against the grazier for a sum equivalent to the deterioration in value of the horse, the pursuer based his case upon averments of fault and negligence on the part of the defender, and on pleas founded on these averments. The proof failed to substantiate any fault on the part of the defender, or to show in what way the animal met the injury. *Held* that as the pursuer had based his action upon fault, which he had failed to prove, the defender was entitled to absolvitor.

Opinion (per Lord Young) that the risk of accidental loss in such a case lay upon the owner and not upon the custodian, and that in order to make the latter liable he must be shown to have been in fault.

On 29th October 1894 Alexander Hutton junior, as manager for his mother Mrs Marianne Braid or Hutton, Cults Farm, Fife, the defender in the present action, undertook to winter a three year old colt belonging to William Sutherland, posting-master and horse and carriage-hirer, Station Hotel, Cupar, the pursuer. The colt was to be kept for a period of six months, and the sum to be paid in return was three pounds. There was some conflict of evidence as to the conditions of the bargain, Sutherland maintaining that nothing was agreed to about risk, and Hutton alleging, on the other hand, that it was arranged that the colt should stand at the owner's risk. It was admitted that the defender was bound to inform pursuer as soon as possible if any accident happened to the animal. The colt was sent to the defender's farm on 30th October, and was put along with a two-year-old Clydesdale colt belonging to the defender in a loose-box opening off the reed in the steading, and thereafter it ran with the defender's colt, was fed along with it, taken out into the same field with it, and generally treated in the same way that it was. On the night of Sunday 13th January 1895 it was reported to the defender by her foreman that the pursuer's colt had met with an injury to its eye. The next forenoon the defender sent into Cupar to inform the pursuer of this injury, and he at once came out and afterwards sent a veterinary surgeon to attend on the colt. In consequence of this injury

the colt lost the sight of the eye, and became in consequence much deteriorated in value. The cause of the injury was never determined although a searching examination was made. There was, however, some barbed wire in the fence of the field in which the colt ran, and there were some jagged and irregular spars in the fence of the reed. It appeared from the veterinary evidence that the injury might have been caused by the colt coming in contact with either the barbed wire or the spars. It also appeared from the veterinary evidence that in all probability the injury was sustained by the colt several days before it was noticed by defender's foreman.

On 12th June 1895 Sutherland brought the present action in the Sheriff Court at Cupar against Mrs Hutton, craving decree for £40 as damages for the injury to the colt.

The pursuer averred—" (Cond. 9) The injury to the said colt's eye was caused either through its being struck on the face by defender, or a person or persons for whom she is responsible, with a ragged or a sharp-pointed stick, or a hayfork, or a stone or a graip. Or otherwise the injury was caused through the colt's eye having come in contact with some of the sharp edges of the reed fence in which the colt was, with culpable negligence, enclosed. On pursuer calling on defender's manager to explain how the colt received the injury, he professed his inability to do so, although he was bound to have been in a position to give the required information. Defender's counter averments are denied."

The pursuer pleaded *inter alia*—" (1) Said colt having been injured while in defender's custody, and by the fault or neglect of defender, as stated, she is liable to pursuer in the loss and damage thereby sustained. (2) Defender having through fault or neglect failed to restore the said colt to pursuer at 31st March 1895 in sound and good condition, and pursuer having thereby sustained loss and damage to the extent of £40, defender is liable to pursuer in that sum. (6) The defender's averments and pleas are irrelevant."

The defender averred—" (Ans. 9) Admitted that the defender's manager was unable to explain how the colt's eye had come by the injury. *Quoad ultra* denied. Averred that every care was taken of the animal during the time it was at Cults, and that every attention possible was paid to the proper treatment and feeding. The defender believes that the injury was the result of a pure accident, against which no amount of forethought or care could provide, and for which in any view the defender is not responsible."

She pleaded, *inter alia*—" (1) The colt in question not having sustained injury through the fault or negligence of the defender, or of those for whom she is responsible, the defender is not liable in damages to the pursuer. (2) The defender having bestowed all reasonable care and attention on the colt while in her custody, is not liable for the consequences of an accident

against which no amount of forethought or care could provide.”

A proof was allowed, in which the defender was ordained to lead, and at which the facts above set forth appeared.

Thereafter on 28th January 1896 the Sheriff-Substitute (HENDERSON) issued an interlocutor, by which, after sundry findings in fact, including, *inter alia*, a finding that one of the conditions of the bargain was that the colt was to stand at the owner's risk, he found that the injury was “one of the risks which the pursuer undertook when he sent the colt to winter under the conditions above mentioned; and therefore found in law that the pursuer had no claim against the defender for the deterioration in value of his colt, and assolvied the defender from the conclusions of the action with expenses.”

Note.—“If this case had to be decided apart from the conditions under which the bargain was made—which it is, however, proper to remark appear to be the usual conditions in Fife, and even elsewhere—I am inclined to think the result would be very different.

“The whole tendency of the law of Scotland with regard to injuries suffered by horses, whether hired, lent, or grazed out, seems to be to make the hirer, borrower, or custodian liable for any injuries which the animal may receive while under his control, unless he can prove that the injury suffered was not owing to any fault in himself, his servants, or anything for which he is responsible. He must prove that he has exercised that reasonable care with reference to the animal entrusted to him which a prudent man would take of his own property. While fully recognising this as the regular rule of law in such circumstances, I feel that in this case, and indeed in all similar cases in Fife, unless the owner makes a separate bargain for himself, the custodian of a wintering colt is understood not to be under that rule. The only obligation he seems to be under is to intimate the occurrence of an accident to the owner as soon as he knows of it himself. Whether this practice has arisen from the infrequency of accidents, or on account of the wretchedly low sum paid for wintering, it is useless to inquire. The practice has been proved to exist, and even if it did not exist as the rule in Fife, it was expressly made a part of the bargain in this case. . . .

“It was urged on behalf of the pursuer that as it is proved by the evidence of the veterinary surgeons examined, that the injury must have taken place from a week to ten days before it was discovered by the defender and communicated to the pursuer, this contributes such gross negligence on the part of the defender in not daily examining the colt as to make him liable for deterioration in value of the colt.

“In order to entertain this proposition at all it is necessary to assume that the injury could have been so successfully treated if taken in time as not to have materially injured the colt's value.

“I can find no evidence to that effect—in

fact, Mr Borrowman says that the eye was damaged from the first, and the pursuer says practically the same thing.

“I cannot hold that the mere fact of an injury of this kind not having been discovered for some days after it had occurred can involve a party to such a contract as was here made in liability for any loss caused by it.

“On the general rule of law, apart from special bargain, a very interesting argument was adduced to me, and the following authorities were cited and have been carefully considered:—For pursuer—*Robertson v. Ogle*, June 23, 1809, F.C. No. 120; *Marquis v. Ritchie*, June 11, 1823, 2 Sh. 386; *Pyper v. Thomson*, February 4, 1843, 5 D. 498; *Smith v. Melvin*, December 9, 1845, 8 D. 264; *Pul-lars v. Walker*, July 13, 1853, 20 D. 1238; *Wilson v. Orr*, November 22, 1879, 7 R. 266; *M'Laren v. Warnock*, June 28, 1883, 10 R. 1053; Bell's Com. i. 488. For defender—*Bain v. Strang*, December 6, 1838, 16 R. 186; *Tavendale v. Gray*, February 16, 1875, 1 Guthrie's Select Cases 494.”

The pursuer appealed to the Court of Session, and argued—The defender here acknowledged that he could not explain how the colt received the injury in question. The *onus* of showing that the animal was injured without fault upon his part lay upon the defender—*Wilson v. Orr*, November 22, 1879, 7 R. 266, especially *per* Lord Justice-Clerk Moncreiff and Lord Gifford, at p. 268; *Robertson v. Ogle*, June 23, 1809, F.C. He had not discharged that *onus*. In the absence of explanation he was therefore liable. This case was ruled by the case of *Wilson, cit.* But, moreover, here there was fault, because it was proved that the injury must have been received some days before notice was sent to the pursuer, and that was in itself fault, for the defender was bound to give information at once of any injury, and if he did not notice it, that showed carelessness in his custody of the colt. As to the special terms of the bargain, it was not proved that there were any special stipulations as to risk, or at least that there were any such stipulations as to supersede the common law as laid down in the case of *Wilson, cit.*

Counsel for the defender and respondent was not called upon.

LORD JUSTICE-CLERK—This case in certain aspects might have raised considerable difficulty, especially in view of certain observations on the law occurring in decided cases. But in the view which I take it is not necessary to consider these questions. The pursuer in his averments, and the pleas which he has based on these averments, asserts that in point of fact the defender was in fault. I have considered the evidence, and the arguments which have been presented to us upon that evidence, and I find that the facts proved do not establish any fault on the part of the defender, and therefore that no facts are proved to support the pleas upon which the pursuer's case is based. These pleas cannot therefore be upheld. On the whole case I am of opinion that the judgment of

the Sheriff-Substitute is right, and ought to be affirmed.

LORD YOUNG—I am of the same opinion. But I would be prepared to go a step further. I think that not only was the action laid upon fault, but it does not occur to me that it could have been laid upon anything else. If we look at the ninth condescendence we find that it sets forth the grounds of the pursuer's case—[*His Lordship read the article*]. I should have thought that the colt's eye was hurt by coming in contact with a projection or nail in the fence, a chance to which all cattle in a field are exposed, though the chances are very considerable in favour of their not hurting themselves in that way. I think the probability is that the animal's eye was hurt in the second of the ways indicated in the article of the condescendence which I have read. If it had been proved that the field was enclosed in a dangerous manner, in a way which no person who engages to take care of other people's cattle was entitled to have his field enclosed, the only question would have been whether such a case was supported by the evidence. It is admitted, and very properly admitted, by Mr Lorimer for the pursuer, that there is no evidence of anyone's having struck the colt, or of its having been injured owing to the dangerous state in which the fence was kept. So it came to this, that the pursuer said, "I don't know how this injury happened, but by law the person who takes charge of an animal under such circumstances is liable, unless he can show it was not his fault." I am quite prepared to negative that, and to say that that is not the law of Scotland, but that the law is, that the risk of accident is not with the custodian but with the owner. The custodian is liable for neglect or any actionable fault, but not for accident without fault. I think that that was what happened here. There was an accident which happened without anyone being to blame for it. That was just a risk—an infinitesimal risk—to which the colt was exposed. I think it will be sufficient in pronouncing our interlocutor to negative the statements of fact on which the pursuer's case rests, to find that in fact there was no fault, and that in point of law there was consequently no liability.

LORD TRAYNER concurred.

The Court pronounced the following interlocutor:—

"Sustain the appeal, and recal the interlocutor appealed against: Find in fact that the pursuer has failed to prove that the accident to the colt in question, belonging to the pursuer, was caused through the fault or negligence of the defender: Find in law that the defender is not liable in damages to the pursuer; Therefore assoilzie her from the conclusions of the action, and decern: Find her entitled to expenses in this and in the inferior Court, &c.

Counsel for the Pursuer and Appellant—Lorimer. Agent—William Black, S.S.C.

Counsel for the Defender and Respondent—J. J. Cook. Agents—George Inglis & Orr, S.S.C.

Wednesday, June 10.

O U T E R H O U S E.

[Lord Kyllachy.

WATSON v. WATSON.

(*Ante*, p. 150, and 23 R. 219.)

Parent and Child—Aliment—Measure of Liability of Father for Aliment to his Sons.

The measure of the liability of a father for aliment to his children is that he is bound, so far as he has the means, to provide such a sum as will with economy educate and maintain them suitably to his own condition in life.

A wife obtained decree in an action of divorce, with the custody of the two sons of the marriage (then in pupillarity) and aliment at the rate of £75 per annum for each until they respectively attained minority. When the two sons were aged respectively 20 and 18, and were engaged in study for the medical profession, they raised an action for aliment against their father, who, though possessed of considerable means at the time of his marriage, had at the date of the action no resources except a capital sum of £2500. *Held* (*per* Lord Kyllachy, Ordinary) that he was bound to aliment each son to the extent of £50 per annum, these allowances to continue (unless and until the Court should order otherwise in the process) in the case of each pursuer for four years.

Andrew Gordon Watson and John Liddell Watson brought the present action against their father Hugh Watson, under circumstances which are fully detailed in the former report and in the opinion of the Lord Ordinary. The action concluded for the payment of the annual sum of £75 to each of the pursuers as aliment in terms of a marriage-contract under which Hugh Watson bound himself to aliment, maintain, and educate any children of his marriage in a manner suitable to their station in life, or alternatively for payment to each of the yearly sum of £40 in name of aliment and expense of education, or such other sum less or more as might appear reasonable in the situation of the parties.

On 10th June 1896 the Lord Ordinary (KYLACHY) pronounced an interlocutor finding the defender liable to each of the pursuers in aliment at the rate of £50 per annum, these allowances to continue (unless and until the Court should order otherwise in this process) in the case of each pursuer for four years.